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THE RELATION
OF
THE NATIONAL GOVERNMENT
TO
THE REVOLTED CITIZENS
DEFINED.

NO POWER IN CONGRESS TO EMANCIPATE THEIR SLAVES OR CONFISCATE THEIR PROPERTY PROVED.

THE CONSTITUTION AS IT IS, THE ONLY HOPE OF THE COUNTRY.

By ANNA ELLA CARROLL.

Congress has now under consideration, the question of the power and expediency of abolishing slavery, and confiscating the property, real and personal, of all, or a large class of the rebels in arms. A question of more transcendent importance, than any that ever before, engaged the attention of the American people.

With an earnest desire that the country may not be led to the adoption of a mistaken and fatal policy, I propose now to contribute my best efforts to a further understanding of this vital subject.

No one doubts the power or the duty of the Government to suppress the rebellion, to use the army and navy, and all the military resources of the country to capture the rebels, and kill them if they will not submit, and destroy their power to war upon us. But, I do not think there is any grant in the Constitution, but rather an express inhibition upon the power of Congress to abolish slavery or confiscate the property of rebels.

There are two clauses in the Constitution which especially refer to the confiscation of property. The first defines the crime of treason, and authorizes Congress to prescribe the punishment; inhibiting, however, the confiscation of property beyond the life of the offender. The second is an absolute prohibition to Congress of confiscation altogether. The first defines the crime in these words: "Treason against the United States shall consist in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court." "The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attained."

Treason is not an offense against society, but an offense against its government; and in all ages, a disposition has been evinced on the part of the governing power, to construe everything as treason which opposed it. And this arises from the natural passion of revenge, the desire to punish for opposition to its authority, the rapac-

ity common to all in possession of political power, and the desire to obtain the money or estate of the convict.

Justice Story, in commenting on this clause of the Constitution, says: "The history of other countries abundantly proves, that one of the strong incentives to prosecute offenses as treason, has been the chance of sharing the plunder of the victims. Rapacity has been thus stimulated to exert itself in the service of the most corrupt tyranny; and tyranny has been thus furnished with new opportunities of indulging its malignity and revenge, of gratifying the envy of the rich and good, of increasing its means to reward favorites, and to secure retainers for the worst deeds."

This feeling is so strong in all governments, that Montesqui was so sensible of it, that he has not scrupled to declare, that if the crime of treason be *indeterminate, that* alone is sufficient to make any government degenerate into an arbitrary power.

The history of England is full of melancholy instruction on this subject.

Nor have republics been exempt from violence and tyranny of a similar character. The *Federalist* has justly remarked, "that new fangled and artificial treason have been the great engines by which factions, the natural offspring of free government have usually wreaked their alternate malignity on each other."

It was under the influence of these admonitions, furnished by history and human experience, that the convention deemed it necessary to interpose an impassable barrier against arbitrary construction, either by *courts* or by *Congress*, upon the crime of treason. Hence it was that the authors of our Constitution guarded the rights of the citizen by defining, specifically, in *what* the act of treason consists, and limiting the power of Congress in its punishment by absolutely inhibiting the confiscation of the estate of the traitor to the government, leaving it free to pass to his heirs.

The second clause of the Constitution in reference to confiscation is: "No bill of attainder or *ex post facto* law shall be passed."

Now, it is to me a matter of great surprise that any should doubt but that the bills before Congress are in direct conflict with this clause.

These bills assume that certain parties have committed treason, and ought to be punished; but being beyond the jurisdiction of the United States, or in States where the civil authority has been expelled; they cannot be brought before the courts of the country for trial: therefore, Congress shall adjudge them guilty of treason, forfeit their slaves and entire estates, and proceed directly to execute this legislative decree by deeds of manumission to the slaves, and seizure and absolute forfeiture of all their estates, as a punishment for the crime, and as "indemnity for the past and security for the future."

If the object had been to have drawn a bill of attainder directly in *conflict* with the Constitution, I do not think one could have been made more efficient or more operative than some of the bills which have been pressed before Congress.

A "*bill of attainder*," as used in the Constitution, is a technical term, and we must therefore look to the common law and the concurrent history for the correct interpretation of its meaning.

Woodison in his lectures says: "But, besides a regular enforcement of established laws, the annals of most countries record signal exertions of penal justice adapted to exigencies unprovided for in the criminal code.

"Such acts of the supreme power are with us called *bills of attainder*, which are capital sentences, and bills of *pains and penalties*, which inflict a milder degree of punishment.

"In these instances the legislature assume judicial magistracy, weighing the enor-

mity of the charge, and the proof adduced in support of it, and then deciding the political necessity and moral fitness of the punishment."

Justice Story says: "Bills of attainder, as they are technically called, are special acts of the legislature as inflict capital punishment upon persons supposed to be guilty of high offenses, such as treason and felony, *without any conviction in the ordinary courts of judiciat proceedings*. If an act inflicts a milder degree of punishment than death, it is called a bill of *pains and penalties*. But, in the sense of the Constitution, it seems that bills of attainder include bills of pains and penalties, for the Supreme Court have said: "A bill of attainder may effect the life of an individual, or may confiscate his property, or both. In most cases *the legislature assumes judicial magistracy, pronouncing against the guilt of the party, without any of the common forms and guards of trial*, and satisfying itself with proof, when such proofs are within its reach, whether they were conformable to the rules of evidence or not. In short, in all such cases the legislature exercises the highest power of sovereignty, and what may be properly deemed an *irresponsible despotic discretion*, being governed solely by what is deemed political necessity or expediency."

But the advocates of the policy of general confiscation, being unable to controvert this authoritative exposition of the term *bill of attainder*, assume the extraordinary position that the prohibition is *not binding* on Congress during a time of rebellion.

I am unable to comprehend how any one can assume this position; for nothing is more certain than that this prohibition was inserted in the Constitution *only* to prevent the exercise of this arbitrary power during a rebellion.

The authors of our Constitution never apprehended that Congress would assume to exercise *judicial magistracy*, except in time of rebellion. They knew well that there never was any motive in time of *peace*—and even if there were, that Congress would not attempt its exercise. For it is only in times of conflict between the public authority and the people that governments have ever attempted the exercise of this extraordinary and arbitrary power.

Justice Story says, "Bills of this sort have been most usually passed in England in times of rebellion, or of gross subserviency to the Crown, or of violent political excitement; periods in which all nations are most liable (as well the free as the enslaved) *to forget their duties, and to trample under foot the rights and liberties of others*." * * "Such acts have been often rseorted to in foreign governments as a common engine of state, and even in England they have been pushed to the most extravagant extent in bad times, reaching as well to the *absent* and the *dead* as to the living.

"The injustice and iniquity of such acts in general constitute an irresistible argument against the existence of the power. In a free government it would be intolerable, and in the hands of a reigning faction it might be, and probably would be, abused to the ruin and death of the most virtuous citizen."

In support of the policy of confiscation, its advocates have searched universal history from the time "when Ahab took the vineyard of Naboth, and David gave away the goods of one of the confederates of Absalom," down to the most arbitrary acts of Napoleon.

They have also cited the various penal enactments of the colonies, during the American revolution, in its justification.

It was, unquestionably, *these very acts* of confiscation by the colonies which led to the clauses in the Constitution prohibiting it in Congress and the States.

Story, in remarking on these acts of the colonies, says, in a note; "During the

American revolution this power was used with a most unsparing hand, and it has been a matter of regret in succeeding times, however much it may have been applauded *flagrante bello*."

Never were a people more jealous of liberty than our fathers were at the formation of the Constitution, and naturally so, too, as upon that Constitution depended the fruits of the independence which they had just achieved at the cost of so much treasure and blood. To guarantee this liberty, they provided in the Constitution for *trial by jury in criminal cases—the definition and punishment of treason—the prohibition of bills of attainder, &c., &c.*

But the people feared that these guarantees were not sufficient for the greatest protection of their liberties, and hence, the 4th, 5th and 6th amendments, restricting the exercise of these grants of power, in these words: "The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, *shall not be violated*, nor shall any person be deprived of life, liberty, or property, *without due process of law*, nor shall *private property* be taken for public use, *without just compensation;* the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State," &c., &c.

Story, in his comments on the vital importance of these amendments, which he characterizes as a bill of rights, says: "It is not always possible to foresee the extent of the actual reach of certain powers, which are given in general terms. They may be construed to extend (and perhaps fairly) to certain classes of cases which did not, at first, appear to be within them. A bill of rights, then, operates as a guard upon any extravagant or undue extension of such powers. Besides, (as has been justly remarked,) a bill of rights is of real efficiency in *controlling the excesses of party spirit.*

It serves to guide and enlighten public opinion, and to render more quick to detect and more resolute to resist attempts to disturb private rights. *It requires more than ordinary hardihood and audacity of character to trample down principles which our ancestors consecrated with reverence*, which we imbibed in our early education, which recommend themselves to the judgment of the world by their truth and simplicity, and which are constantly placed before the eyes of the people, accompanied with the imposing force and *solemnity of a constitutional sanction.* Bills of rights are a part of the *muniments of freemen*, showing their title to protection; and they become of increased value, when placed under the *protection of an independent judiciary*, instituted as the appropriate guardian of the public and private rights of the citizens."

It is sad to witness senators and representatives in the great republic of the United States, in contempt of the warnings of history, drawing their principles and precedents from the most cruel and revengeful tyrants, and displaying a "hardihood and audacity of cha acter in trampling down the principles which our ancestors have consecrated with reverence, which we imbibed in our early education, which recommend themselves to the judgment of the world by their truth and simplicity; and which are constantly placed before the eyes of the people, accompanied with the *imposing force and solemnity of a constitutional sanction.*"

We are not permitted to doubt, but that these bills originate in the worst and most malignant passions of the human heart; and are pressed in utter *contempt*, of our constitutional guarantees.

Listen to Senator Sumner's words, uttered on the 19th of the present month, in the country's Senate Chamber.

"With the *provision in our Constitution, applicable to jury trials in criminal cases*, it is obvious that throughout the whole rebel country there can be no conviction under such statutes. Proceedings would fail through the disagreement of the jury, while

the efforts of counsel would make every case an occasion of irritation. For weal or woe the gallows is out of the question, it is not a possibility as a punishment for this rebellion. *Nor would any considerable forfeiture or confiscation be sanctioned by a jury* in the rebel country. * * * * * * *
Surely we ought to take all proper steps to avoid such failure of justice." * *
* * * * * * * * * * * *

"Strike down the leaders of the rebellion and lift up the slaves. * * *

"But the tallest poppies must drop. For the conspirators who organized this great crime, and let slip the dogs of war, there can be no penalty too great.

"They should be not only punished to the extent of our power, but they should be stript of all means of influence, so that, should their lives be spared, they may be doomed to wear them out in poverty, if not in exile. To this end their property must be taken. * * * * * * * * *
But the property of the leaders *consists largely of land owned in extensive plantations.* It is just that *these should be broken up,* so that they can never be again the nursery of conspiracy or disaffection.

"*Partitioned into small estates* they will afford homes to many who are now homeless, while their peculiar and overbearing social influence will be destroyed.

"Poor neighbors, who have been so long duped and *victims,* will become independent settlers of the soil. Brave soldiers who have left their northern skies to fight the battles of their country, resting at last from their victories, and changing their swords into ploughshares, will *fill the land with northern industry, and northern principles.*"

Here is a distinct proposition to set aside the most sacred guarantees of the Constitution, to uproot the social system of one-half of the American Union, numbering in the aggregate some twelve millions of souls; and to partition their land to the poor and to the slaves, and to the soldiers of the other half of the Union; and to fill the South with a foreign industry and foreign principles!!

I cannot recall to memory any instance surpassing the atrocity of this proposition, in all the annals of despotism.

But the advocates of confiscation by Congress feel it obligatory upon them to find some support in the Constitution for the exercise of this power.

Senator Howard, in his argument, assumes, that the power "to declare war, to make rules concerning captures on land and water, to raise and support armies, to provide for calling forth the militia, to suppress insurrection and repel invasion," *does by implication* give this right, and he claims it as a *war-measure.*

He says, "if Congress has not the power to confiscate the property of the enemy as a punishment, and as an indemnity for the cost of the war, that the American people have thrown away, for all time to come, the most efficient means of crippling and humbling the enemy."

This theory of Senator Howard has been adopted, I believe, by all who have spoken on this side of the question, whose speeches I have examined.

The argument is this: Because Congress has the authority to confiscate the property of a subject of a *foreign* State in time of war, and vest it in the United States, therefore Congress has the authority to confiscate the property of a citizen of the United States in time of civil war and vest it in the government of the United States.

This, I apprehend, proceeds from a total misconception of the true nature of the Constitution and the principles of international law.

The right to punish an enemy and hold his property responsible for damages, is inherent in all nations, but *how* this right shall be exercised, depends upon the peculiar structure of their government. In ours, the right to punish a *foreign enemy* and hold his property liable for damages, is vested by the Constitution in Congress as the supreme legislative power of the nation. But the right to punish a domestic

enemy and hold his property liable for damages, is *exclusively* vested in the Executive and Judiciary Departments.

"In a state of *equality*," says Rutherforth, "after an injury is committed, any who have suffered any damage by it are at liberty to make themselves amends at their own discretion, and by their own force. They are at liberty *to take so much of the offender's goods as is equal in value to what they have lost*, and the law of nature will give them property in the goods so taken.

"But in a state of civil society, if both the offender and the sufferers are under the protection of the same society their right of obtaining reparation *is restrained and becomes subject to the civil jurisdiction.*"

Absolute governments may punish their subjects by the direct exercise of the sovereign power, but no government can do this which claims to be free.

For the punishment of crime the Constitution provides *civil tribunals*, and has provided a civil force to bring the offender before its judgment bar, and if this civil force be insufficient, by reason of the strength of the offender, then there is a military force provided to bring all offenders, *not collectively or by States*, but *individually*, *before the courts of the land*, and there they can be deprived of their property, their liberty, or their life!

Surely no one will contend that the grants of power in the Constitution authorizing Congress "to declare war, to grant letters of marque and reprisals," &c., confers on Congress the authority to declare war against any State of this Union, or any number of citizens of any State, or to authorize any citizen of this Union to make reprisals upon another citizen.

We are left in no doubt upon this subject, for when the proposition for *authorizing the exercise of the military force of the General Government against a delinquent State* was being considered, Mr. Madison opposed it, saying "*that it looked too much like the power to declare war, and would probably be considered by the party against whom it was used as a dissolution of the compact.*" He moved the postponement of this question, which was unanimously agreed to, and was never again brought before the Convention.

Could Congress use this power, and declare war against any State or any citizen of the Union: Could it grant letters of marque and reprisal to war upon the citizens, one against another: Then, truly, as was forcibly expressed by a Senator, if this be our political system, it is not worth much—surely it is not worth the cost of a terrible war.

Before Congress can claim to exercise this power of war over any portion of the American people, it must first recognize the rebellion as a success—*their revolution accomplished, and the Union dissolved.* In short, must concede to the rebellion —what no European power has ventured to do—that they have achieved their independence, and have established a firm and stable government, against which it is no longer proper to war with the view of suppressing it.

For Congress to take that position, and treat the rebellion as a *foreign nation*, and continue the war from malice or vengeance, is to become allies of the rebellion, and ourselves *traitors, like them, to the Constitution.*

Fortunately, however, for civil liberty, the Constitution confers ample powers upon the Government for its own preservation and just defense against all combinations of domestic foes.

While the Constitution withholds from Congress all power to declare war against any member of the Union, that instrument confers on Congress ample authority to

provide and maintain a *military force*, and upon the *President* ample authority to *use* that force in the defense of the nation, by the suppression of insurrection or rebellion, whenever the civil force is not sufficient for that end.

War may exist between the General Government and a portion of the American people, but, under the Constitution, it never did and never *can* exist, except by armed resistance to its authority. Citizens may "*commit treason against the United States, in levying war against them*," and thus (as in the present instance) involve the country in all the horrors of civil war.

But they do not, therefore, become *enemies* in the sense of the law of nations, they are *still citizens of the United States*, and *owe allegiance to this Government*, and are *liable to punishment for their crimes; and they cannot escape from their allegiance or their liability for punishment due their crimes*, unless they flee from the country of their birth, never again to look upon its flag!

For, if *Congress is true to the Constitution*, they never *can* establish within the limits of the United States, a government to protect and shield them.

If we will but comprehend the reason of the rule in the laws of nations, why one nation has the right to hold the persons and property of another responsible, for the injuries inflicted by his government, I think it will be conceded that the rule has no application to a rebel, in a civil war.

Writers on general jurisprudence have considered nations as independent moral persons living in a state of nature, where there is no common tribunal to settle controversies with other nations but that of force.

When an injury is inflicted upon one nation by another, and reparation is withheld, there is no way to recover it except by war; because independent nations, from the very nature of things, are not subject to the civil tribunals of any other nation.

A nation is no otherwise responsible than through her people. There is no means of recovering reparation except by holding them and their property, public and private, responsible to the offended nation. *These* constitute not only the wealth of a nation, but are the nation itself.

"As a nation consists of an aggregate of individuals, the property of the nation is the property of all its individual members, and as a consequence a claim to indemnification for injuries sustained by a *foreign State* may be satisfied by a seizure of the property of any of the individual members of *that State*."

"That by the law of nations the whole property of the individual members of a State is responsible for the debts or obligations of the State or of the sovereign."

"A nation has a complete right by the law of nature to take *possession* of the property of an enemy as far as the purpose of equitable satisfaction, or the necessities of just warfare require, so as to obtain in the well known phrase, 'indemnity for the past, and security for the future.'"

As Rucherforth states, with more clearness than any other writer, the principle of this rule in the law of nations, I will cite him fully on this point.

"But we acquire no right, corporeal or incorporeal, by the mere act of war, and it is a settled principle in the law of nations that without some natural or antecedent right the mere taking of a thing by war is no right at all. * * * *

"In a war which is internally just, as a nation may take the person, so, likewise it may seize upon the goods of the enemies, either movable or immovable, as far as such seizure is a necessary means to bring them to do what is right; but *what is seized only for this purpose does not become the property of the captors; the possession is just till the purpose for which the goods were taken is answered.* But as soon as the claims of the injured nation are satisfied, the justice of the possession is at an end. * * * * * * * The surest way of trying whether it is the claim of war or the claim of a tacit consent, in concluding a peace which gives us property in all such goods as are taken in war, is to inquire what sort of right we have to them before peace is concluded.

"There is no law of nations which forbids our enemies to continue a war when no other cause of dispute remains besides our detention of such goods as we have taken in the war beyond the equivalent for damage and expenses. As the law of nature will allow this to be a just cause for continuing a war, so there is no practice of nations and no general opinion of mankind that determines otherwise. But, if any law of nations had given us property in such goods, the same law must necessarily condemn the adverse nation for continuing a war merely because we would not give them up; for the design of such a war would be to take from us what the law of nations had made our own.

"This opinion that all goods which are taken in war are not strictly our own by any law of nations till peace is concluded; that is, till some consent, either express or tacit, has made them our own by the law of nature, seems to be the general opinion of mankind in respect to immovable goods, such as fortified towns or provinces which have been overrun in war.

"The captors are looked upon, *while the war lasts, to be only in possession* of them; and though this possession may help them to make a better bargain for themselves in a treaty of peace than they could do otherwise, yet the property which they have in things of this sort is deemed to be precarious until a treaty of peace has ascertained and established it.

"It is usual in treaties of peace to mention such immovable goods particularly, and the captors, if they acquire property in them, acquire it by express consent. We may therefore reasonably conclude that the property which the captors have in all movable goods taken in war is likewise acquired in the same manner.

"The only difference is, that immovable goods, which are generally the most important, are in the hands of the public, and can readily be returned, whilst movable goods are of less consequence, are in private hands, and, because they have either been consumed or have not been kept together, cannot be returned so readily. For this reason, whilst the property in the former is adjusted by express consent the property in the latter is left to pass from the original owners to the captors by tacit consent."

Hence, we perceive that this *right* gives to the captor only the *possession* and use of the property of an alien enemy during war; but the *title* does not pass, except by the *consent* of the nation to which the property belongs.

This *consent* is presumed in favor of movable goods, on account of their perishable nature, and the difficulty of identifying them.

But this rule cannot be applied to *rebels*, in a *civil war*, and for obvious reasons.

Because, if the "rebels in arms" have not, in fact, dismembered the Union and formed an independent sovereignty, they are to-day *citizens* of the United States, and their property is a part of *its eminent domain;* therefore, no law of war can confer upon the United States a higher claim to their property than it now has, by the Constitution.

To transfer the property from the citizens to the coffers of the Government would not increase the national wealth; it would add nothing to the national resources to take that which *is already ours.*

But, concede that the rebels have displaced the national sovereignty, and become a *foreign nation*, then, upon a re-conquest of that territory, our Government would enter upon their rights of sovereignty; take possession of their national domain and national revenues; seize and detain their citizens as prisoners, and their property, to compel them to do what is right.

But, if we destroy that rebel power altogether, and retain the territory, our claim to indemnity for the past and security for the future is satisfied.

Vattel says:

"The conqueror, who takes a town or province from his enemy, cannot justly acquire over it any other rights than such as belonged to the sovereign against whom he has taken up arms.

"But if the entire State be conquered; if the nation be subdued; * * * if the

conqueror thinks proper to retain the sovereignty of the conquered State, and has a right to retain it, * * * reason plainly evinces that he acquires no other rights, by his conquest, than such as belonged to the sovereign whom he has dispossessed; and, on the *submission* of the people, he is bound to govern them *according to the laws of the State.*"

Chancellor Kent says:

"It is a settled principle in the law and usage of nations, that the inhabitants of a conquered country change their allegiance, and their relations to their former sovereign is dissolved, but *their relations to each other*, and *their rights of property*, not taken from them by orders of the conqueror, remain undisturbed."

And he cites the Supreme Court as deciding that "the laws, usages, and municipal regulations, in force at the time of the conquest or cession, remain in force until changed by the new sovereign."

It follows, therefore, that the rebel territory, with the rights of persons and of property not destroyed by the struggle, fall at once under the protection of the Constitution and municipal laws.

We have had in our history but two occasions to exercise this right against foreign nations. In our war with Mexico, in which we sent our armies to her capital, for the purpose of obtaining indemnity. *There*, we respected *private rights*, and abstained from the seizure of *private property;* and being unable otherwise to obtain indemnity, we took, by conquest, a portion of her territory, paying her, in money, for the excess over and above the amount of our claim for indemnity. Now, had a proposition been made in Congress to confiscate the property of the people of the conquered territory, for the acts of the Mexican government, its repugnance to the law of nations would have shocked the moral sense, even of the Congress of that day.

The first act which broke their allegiance to the Mexican government and transferred it to the United States, did, in the judgment of all publicists, bar all claim on them for the acts of their former government.

But, in one respect, this civil war does resemble a war with a foreign nation. The insurgents have subjugated some eleven States of the Union, and have expelled all National and State authority, and have enforced acquiescence and qualified allegiance to their arms and revolutionary government.

This calls for the exercise of new duties, *new*, I mean, from the fact that there was never before any necessity on the part of our Government for their exercise.

But, though they are *new*, we cannot mistake our way if we will only consider the nature of this civil strife, and how far the relations of the citizen is affected while the national authority remains displaced by the rebel force.

On this point Senator Sumner cites from Grotius: "The first and most necessary partition of war is this, that war is *private*, *public*, and *mixed*. Public war is that which is carried on under the authority of him who has jurisdiction. Private, that which is not so. *Mixed, that which is public on one side and private on the other.*"

And he says, "In these few words of this great authority, will be found that very discrimination which enters into the present discussion. The war in which we are now engaged * * * * * is 'mixed,' that is, public on one side and private on the other. On the side of the United States it is under the authority of the Government, and is therefore 'public;' on the other side it is without the sanction of any recognized government, and is therefore 'private.' In other words, the Government of the United States may claim for itself all belligerant rights, while it may refuse them to the other side."

This is a false inference from the *misapplied* principle of Grotius.

Rutherforth, the recognized expositor of Grotius, in commenting upon this *very passage* in its application to civil war, says:

"If any one should ask whether these internal wars of a civil society are public or private, or mixed, we must certainly answer that in the language of the law of nations they are neither. For since this law takes no notice of what passes within a civil society, as far as what passes there has no reference to the rest of mankind, it has no occasion to mention wars of this sort, and therefore gives them no name. It does not so much as call them *wars*, and much less does it rank them under the head of *public*, or *private*, or *mixed*. * * * * * * *
The law of nations does not call them wars, not because they are not wars, but because they are such acts as do not come within its view, and as it has therefore given no name to. They have certainly the nature of war, for they are contentions by force. Common usage likewise has given them this name, and calls them *civil wars*.

"And, if we attend to the nature of the act, we shall find that civil wars may be either *public*, mixed, or private."

"A civil war * * may be called a public one, when the heads of each party are respectively considered, by their own people, as *public persons*. A rebellion may be called a mixed war, when one of the parties is under the conduct of a public person, and the other consists of private persons: It may be called a private one, when there is no subjection on either side."

According to this very principle of Grotius, a civil strife partakes of the nature of a public war, whenever it is carried on against the Government by an organized force, acting through regular constituted authorities, regarded and accepted by the rebels as public persons.

It is then a contest between the lawful government on one side, and an *unlawful*, but *de facto*, government on the other.

Now to claim that this rebellion is "private" on their side because their government is not a "*recognized* government," shows a most singular confusion of principles in the mind of the Senator. For were their government "recognized," it would *then* cease to be a civil war at all, and would become a public war between two foreign nations.

From the very nature of things the claim to exercise a right is founded upon a corresponding obligation. Our Government cannot claim belligerent rights without *conceding* the existence of a power (call it what you may) that is under an obligation to *yield* them; and an obligation to yield implies a corresponding obligation on the other side.

While a rebellion remains within bounds, manageable by the civil force, or by the military force acting in aid of the civil authority, there is no claim to exercise or duty to yield *belligerent rights;* and the relation of no one to his government, in the theater of the rebellion, is affected in any way.

But when a rebellion attains to such proportions as actually displaces all civil authority, and subjects a portion of the territory to its dominion, the relations are purely *belligerent*, and must remain *belligerent*, until the civil authority is restored. For there can be no civil relations without authority to protect the citizen; our Government can hold none whatever with the people of the subjugated States until the rebellion is suppressed, and its authority re-established. The fact that these rebels possess the military power competent to displace, and *have* actually displaced, all civil authority, elevates their struggle to the dignity of war. It calls for the exertion by the Government of its military power, and it must deal with this strife for the present only with this military force. Martial law may be applied to all the sections of country where the rebellion has displaced the civil authority, and every citi-

zen of the United States may be subjected to martial law; their property may be seized and used by the military power, if the public safety shall require it.

But private property of the rebels, which may thus be captured, is not, by any law of nations, nor cannot be, by any act of Congress, vested in the United States, unless upon the recognition of their independence as a nation. For, by the rights of *postliminium*, upon the destruction of the rebel power, every person is restored to his former rights, and every thing that has not passed beyond the jurisdiction of the United States, which can be found and identified, returns to its former state, under the Constitution.

"The right of postliminium," says Vattel, "is that in virtue of which *persons and things*, taken by the enemy, are restored to their former state, on coming again into the power of the nation to which they belonged.

"The sovereign is bound to protect the persons and property of his subjects, and to defend them against the enemy. When, therefore, a subject, or any part of his property, has fallen into the enemy's possession, should any fortunate event bring them again into the sovereign's power, it is undoubtedly his duty to restore them to their former condition, to re-establish the persons in all their rights and obligations, to give back the effects to the owners: in a word, to replace every thing on the same footing on which it stood previous to the enemy's capture."

"Among the Romans, indeed, slaves were not treated like other movable property; they, by the rights of *postliminium*, were restored to their masters, even when the rest of the booty was detained. The reason of this is evident, for it was always easy to recognize a slave and ascertain to whom he belonged."

The rights of *postliminium* are not under the cognizance of the law of nations.

Manning, in speaking of the usages of different nations, says: "Thus it will be seen that no general rule obtains regarding *postliminium*; different States have different regulations on this subject; and, as it is a question which concerns members of the same State rather than subjects of different States, its details belong to municipal law rather than the law of nations."

When, therefore, a rebel is brought again, either by force, or by his own volition, under the power of the United States, the Government is, by the Constitution, bound to re-establish him in all his rights and obligations, and, upon his submission to its authority, give back to him his property.

It is too clear for argument that, during the military occupation of any town, district, or State of the Union, by an invading force of a foreign nation, Congress would have *no authority* to confiscate the property of any American citizen, inhabitant of that town, district, or State. And should the citizens, no matter from what motive, whether from instinct of self-preservation, or from disloyalty, join the invading force, and fight in its ranks against their country, they do not *thereby* become public enemies—they do *not forfeit their allegiance to the country*—they *cannot* defeat the country's claim to *punish them according to the laws of the land*. They cannot plead upon the trial for giving aid and comfort to the enemy, that they were traitors, and fought *willingly* against their flag, though they may *plead*, and *plead successfully*, that the temporary inability of the Government to protect them against the superior hostile force, constrained their temporary submission.

True, the military generals of our country cannot distinguish the *nationality* of the enemy in arms, but will capture or kill all alike, until they surrender to the authority of the Government, or flee beyond its frontiers. But the legislative power *must* distinguish a nationality, *must* recognize the American citizen, *must* recognize his constitutional rights to protection, and his liability to punishment for crime. While it may hold the nation, to which this foreign force belongs, responsible for *indemnity*

and *security*, and may look to every citizen or subject owing allegiance to this power, it cannot look to its *own citizens, nor confiscate their property, nor hold them as hostages*, in order to constrain a foreign government to make compensation for wrongs inflicted.

The same rules which apply to any portion of the citizens of the United States, which may be subjugated by an *invading* force, applies *now* to the citizens of the Southern States who are subjugated by the *rebel* force.

The duty of allegiance and protection are reciprocal; therefore, when a State loses the power to protect any portion of its territory and inhabitants, by reason of the superior force of a hostile power, the people so reduced necessarily must yield obedience to the *de facto* government.

Their property and persons are claimed by the conqueror, but their allegiance is not severed from their government, unless the conquest is confirmed by the consent of the conquered.

Castine, in the State of Maine, was captured and held by the British forces in September, 1814, and continued in their exclusive possession until the treaty of peace in 1815.

The Supreme Court decided that the *sovereignty* of the United States was *suspended*, and that the inhabitants passed under a *temporary allegiance to the British Government.*

The Territory of Michigan was surrendered to the British Government by Gen. Hull, on the 16th of August, 1812, and continued in its possession until September 30th, 1813. During this time, the American laws were continued in force, and the civil officers who remained in the territory were continued in office. Judge Witherill, and other officers of the territory, were paid their full salaries during the period of the British occupation.

The citizens and civil officers of Michigan who remained and submitted to British authority, were not regarded by our Government as enemies; but that was before the discovery of the theory of political *felo de se.*

Now, when a *revolted people* have actually expelled their lawful government, and, in its stead, established a *de facto* one, the condition of the citizens is precisely the same as in the case of a lawful government expelled by a *foreign* force. Therefore, while a government is unable to afford *protection* to its citizens, it *cannot* hold them responsible for any act they may commit *while under the pressure* of a usurping power.

What, now, are the *facts* in reference to this Southern rebellion?

Have not the rebels expelled every vestige of authority, both of the States and the United States, and established over that territory their revolutionary government?

Have they not gibbeted, imprisoned in dungeons, or driven into exile, all who would not submit to their despotism? For more than twelve months the Government of the United States has been unable to extend to these people the protection of its authority; *no flag* has been seen there, *no emblem of authority on the part of the United States to protect and shield them.* To punish these people for acts committed while under the dominion of this hostile force, and while the government of the United States was unable to protect them, would be a flagrant violation of every principle of natural and political law. It would place the authors and executioners of the injustice upon the scroll which bears to infamy the name of Jeffreys, the judicial murderer under Charles the Second.

No, no! what the United States may rightfully do is this: The President, upon the re-establishment of the civil jurisdiction, may bring to trial and condign punishment the authors and instigators of this rebellion. If the law against treason is not deemed sufficiently just, in view of the enormity of their crime, Congress may provide the punishment for all who do not lay down their arms so soon as they can receive the protection of their Government. It may exclude them *forever* from all offices of honor or emolument; it may *fine, imprison, or execute them;* in short, it may declare any *punishment*, provided it works no corruption of blood or *forfeiture beyond the life* of the traitor.

Having established that the *responsibility of the people of the subjugated States* to the General Government *depends* upon *its power to extend protection over them*, I now propose to inquire *what are the relations of the General Government to the people where* the rebels have been subdued, but yet *before the civil authority has been re-established?* a question, perhaps, of more importance than any which has ever engaged the attention of the American people.

We have effectually overcome the rebellion in some of the States, and in many cities and districts of other States, and it is evident that within a short time, if Congress will but stop its career of violence against the Constitution, we will have overcome it in all the States.

It is not probable that the people will return within a short time to their allegiance, or that the Government will be able to extend the civil authority over the *whole* of that territory.

It will be the work of time.

A large class of these people have become *thoroughly alienated* from the Government, whether by the efforts of demagogues, or from whatever cause. A large class still love the Union, and cling to the precious memories of its past history; who *honestly believe* it is *dissolved*, and *never can be restored*. Then there is another class who, shocked by the terrible power of the rebellion, *have lost all hope and confidence in the power of republican institutions*.

If Congress will but abstain from all interference, there is no *doubt* about the ability of the President and his patriotic army to suppress the rebellion in every part of the territory. But the difficulties are in restoring *peace* to this distracted country *after* the rebel armies are overthrown

This requires the exercise of the highest and noblest qualities of statesmen. I would have Congress make no mistake *here*. I would have them inaugurate no policy of *doubtful constitutionality*. Peace can only be restored to the country by extending to the people the shield of the Constitution. The union of these States *cannot* be restored under a *mutilated Constitution*, or under a new or different one.

Now, until the protection of the Constitution is extended over the subjugated States, and the civil authority is re-established, the relations of the people to the Government must necessarily remain *purely military*. That is, *martial law* is the only law the Government can apply, in the absence of civil authority.

The right to apply martial law to the citizens of the United States, and subject them to military government is conferred by the clause of the Constitution authorizing the suspension of the privilege of the writ of habeas corpus.

There are several instances in which this power has been exercised in the history of this Government, and it was first used under the administration of President Washington, during what was called the whisky insurrection.

It was used by Gen. Wilkinson at the time of Burr's conspiracy, and by Gen. Jackson in the war of 1812. Gen. Scott applied martial law by military government in Mexico during our war with that country. But within the United States the public safety never required the application of martial law to whole communities of citizens until the present rebellion.

The establishment of a military government in the States of Tennessee and North Carolina indicates the President's policy for the restoration of the subjugated States to their rights in the Union, and is, as I believe, the *only* policy which can by any possibility effect it.

A military government, when established over a territory, holds the whole population, as it were, prisoners of war, subject to the rules of war. Its operations are confined to military questions, and subjects all civil relations to its supervision and control; though, in fact, it exercises no civil *authority*, and Congress can confer upon it none, as its very existence depends upon the absence of civil authority.

It may exercise over the people of a district who are subjected to its authority, all the rights which military commanders may exercise over their prisoners, according to the rules of modern warfare.

It may provide for their rigorous imprisonment, or it may parole them.

It may exercise the extreme rights of the code of war over the life, liberty, and property of every citizen who *revolts* against its authority.

But it has *no right* to take the life or *confiscate* the property of the people who have *submitted* to its authority, any more than a commander has to *murder* or *plunder* his prisoners, and Congress can confer upon it none.

For Congress has no more power to interfere with the conduct of a military governor than it has to interfere with the ordinary operations of the army before an enemy.

It is *not* for Congress to pursue our generals in the field, and say where to plant this battery, or what house shall be battered down, what field ploughed up by cannon, what cities shall be burned, or what country shall be laid waste.

The direction of the operations of war belongs *not* to the legislative department; the Constitution has vested it *exclusively* in the *President* as *Commander-in-Chief*.

It is only for Congress to raise and support an army sufficient for the suppression of the rebellion. It is the President's duty to *command and direct it*.

And this military force, *directed by the President*, may employ every means known to civilized warfare. It may subject all persons to martial law, "when the public safety may require it," and seize and use all property, within the field of its operations, to annoy, to weaken or destroy the rebellion.

And this without a regard to the ownership of the property, whether friend or foe, and leave to the political power to settle with the claimants, according to their respective rights UNDER LAW.

This is a fearful power, but *without which* no government can *live*, and, unfortunately, by it most free countries have been destroyed.

The authors of our Constitution understood this *much better* than the men in *this day*. They placed this power exclusively under the control of the *President*. The danger of confiding the military power *exclusively* to his hands was fully considered by them. They guarded against the *abuse* by vesting in *Congress* the exclusive authority to raise and support this military force; and they guarded against the abuse of Congress by withholding from it the authority to make appropriations for a longer period than two years.

Senator Howard asks:

"Have the people of the United States stript themselves of all power to control the operation of the wars in which they may be involved?

"Is nothing left to their representatives but to furnish the men, the material, and the money, and are their orders as to the *mode* in which and the *purposes* for which these shall be used totally powerless and void?

"And does the Constitution subject to the will of the President exclusively the use of the military force in all the details of the service?"

These very objections were urged by the opponents of the Constitution in the State conventions which adopted it.

Justice Story, in his commentaries upon this power of the President, says:

"Of all the cases and concerns of Government the direction of *war* most peculiarly demands those qualities which distinguish the exercise of power by a *single hand*. Unity of plan, promptitude, activity, and decision are indispensable to success, and these can scarcely exist, *except when a single magistrate is entrusted exclusively with the power*. Even the coupling of the authority of an *executive council* with him in the exercise of such power enfeebles the system, divides the responsibility, and not unfrequently defeats every energetic measure.

"*Timidity, indecision, obstinacy*, and *pride of opinion* must mingle in all such councils, and infuse a *torpor and sluggishness destructive of all military operations*."

But the Senator takes another and a bolder step. He says:

"The *President is our general and bound to execute our behests, subject to the will of Congress, and liable for disobedience to be reduced at once to the condition of a private citizen and incapacitated to hold any office of honor or emolument under the Government*."

The absolute supremacy of Congress is avowed by another Senator, in these words: "There is no limit over the power of Congress, it is *supreme*, and the ordinary provisions of the Constitution must *yield* as resolved by Congress."

I do not charge that there is a conspiracy in Congress to grasp the sword and overthrow republican institutions, and establish upon its ruins a legislative despotism. But certain it is, that unless this claim is rebuked by the country, it will end in one.

For, if Congress can exercise this power during war, the war will never end, except with the destruction of liberty. Grant the power during war, and Congress will continue the war for the sake of the power. For the annals of the world record no instances where the usurpers of power have ever, voluntarily, laid it down.

When Congress emancipates the slaves and confiscates the estates of the proprietors, and portions them to the poor and the slaves, in order to fill the South with "northern industry and northern principles," it will continue the war in order to enforce its enactments.

Senator Sumner will not have Congress "fasten upon itself, *the restraints of the Constitution*." He will not have it "repeat the ancient tyranny which compelled its victims to fight in chains."

Unless wiser counsels shall prevail, or unless restrained by the President, Congress, "*unchained by the Constitution*," will move its armies swiftly over the liberties of the country, both South and North.

Our legislators who would disregard the constitutional guarantees of liberty may learn a lesson of Frederick the Great, who desired to remove a wind mill which stood before the center window of his favorite palace at Pozdam, but could not induce the miller to sell it. The King, irritated, threatened the owner, to force him to consent. "*There is a Supreme Court in Berlin*," answered the miller. The King was silent, and the mill stands to this day, an annoyance to the palace, but one of the *best monuments* which an absolute monarch ever erected to himself.

The authors of our Constitution, witnessing the slavery of every people in every age, by the union of all powers, legislative, executive, and judicial in one body, and with a consummate knowle of the philosophy of government, distributed its powers into three departme -legislative, executive, and judicial—defining the respective spheres of each with such precision that it is impossible to misunderstand it.

Despotism is inevitable wherever power is lodged in a single body, whether in one or in many; whether in a single executive or a numerous legislative body.

That "we, the people of the United States," do not exert our power directly, but by representative bodies, severally restricted, by a written Constitution to certain specific duties, constitutes the *peculiar merit* of our form of government, and its successful working, hitherto, has been the proud boast of Americans, as *their contribution* to the science of free government, the first and only one, ever known in the history of the world.

Shall it be the last? The last of all the ages, the last of all the lands? And shall our Union, rent by factions, after all, pass away—pass like a star that sets to rise no more, no more, forever?

Henry Polkinhorn, printer, Washington.